(2)

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. 92-821

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE HONORABLE EVAN BAYH GOVERNOR OF THE STATE OF INDIANA, and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Petitioners

v.

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ABRAMSON, FREEDMAN & THALL
*By: Bruce L. Thall
2128 Locust Street
Philadelphia, Pennsylvania 19103
(215) 545-2400

WHITE & RAUB
By: Ronald J. Waicukauski
One North Capitol Avenue
Tenth Floor
Indianapolis, Indiana 46204
(317) 236-8011
Counsel for Plaintiffs/Respondents

**Counsel of Record*

BEST AVAILABLE COPY

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

COUNTERSTATEMENT OF QUESTION PRESENTED

Does not the dormant Commerce Clause render unconstitutional facially neutral statutes which are designed to and do bar the importation of out-of-state generated municipal wastes, where no meaningful evidence supporting the *post hoc* justifications proffered by the petitioners is introduced into evidence and the proffered justifications are not advanced by the statutes?

TABLE OF CONTENTS

	Page
COUNTERSTATMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
I. INTRODUCTION	1
A. Respondents And Their Role In Interstate Commerce	1
B. Procedural History	2
C. The Seventh Circuit's Opinions And Orders	3
II. INDIANA'S CAMPAIGN AGAINST OUT-OF-STATE WASTE	6
III. ECONOMIC BARRIER TO INTERSTATE COMMERCE ERECTED BY THE STATUTES	9
IV. NO EVIDENCE OF ADVERSE HEALTH EFFECTS OR DAMAGE TO COMMERCIAL REPUTATION	11
REASONS FOR DENYING THE PETITION	11
I. DISCRIMINATORY EFFECT IS A WELL-SETTLED BASIS FOR APPLYING ELEVATED SCRUTINY TO STATE STATUTES	13
II. LIMITING ELEVATED SCRUTINY TO FACIAL DISCRIMINATION WOULD REVERSE NUMEROUS DECISIONS OF THIS COURT AND EMASCULATE THE DORMANT COMMERCE CLAUSE	18

TABLE OF CONTENTS – *(Continued)*

Page

III. THE PETITIONERS' CLAIM OF ERROR IS UNDERCUT BY THE AUTHORITIES ON WHICH THEY PURPORT TO RELY. 21

IV. THERE IS NO CONFLICT IN THE CIRCUITS; MOREOVER, THIS COURT HAS GIVEN THE GUIDANCE WHICH PETITIONERS SEEK 22

V. PETITIONERS' CLAIMED "ERROR" IS IRRELEVANT TO THE SEVENTH CIRCUIT'S JUDGMENT 24

VI. THE SEVENTH CIRCUIT'S ALTERNATIVE HOLDING UNDER THE *PIKE* TEST PROVIDES A CORRECT AND INDEPENDENT BASIS FOR ITS DECISION 24

VII. THE $100 REGISTRATION FEE WAS PROPERLY STRUCK DOWN PURSUANT TO THIS COURT'S ANALYSIS IN *SCHEINER* 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: Page

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) 6, 19, 27

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 19, 23

Best & Company, Inc. v. Maxwell, 311 U.S. 454 (1940) 19, 20

Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) .. 19

Brimmer v. Rebman, 138 U.S. 78 (1891) 19, 21

Brown-Forman Distillers v. N.Y. State, 476 U.S. 573 (1986) 26

Chemical Waste Management, Inc. v. Hunt, 504 U.S. ____, 112 S.Ct. 2009 (1992) ..... *passim*

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) ..... *passim*

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 21, 22, 26

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 19, 20, 21

Edgar v. MITE Corp., 457 U.S. 624 (1982) 26

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 21

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. ____, 112 S.Ct. 2019 (1992) ..... *passim*

Government Suppliers, et al. v. Bayh, et al., 753 F.Supp. 739 (S.D. Ind. 1990) 7, 8

Healy v. Beer Institute, Inc., 109 S.Ct. 2491 (1989) 19, 26

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 16, 19, 21, 22, 23, 27

Kassell v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 19, 26

Nippert v. City of Richmond, 327 U.S. 416 (1948) .. 20

Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987)..... 23

Pike v. Bruce Church, Inc., 297 U.S. 137 (1970)..... 6, 14, 19, 20, 25

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978)..... 19

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 19

Statutes

28 U.S.C. §1331 2

28 U.S.C. §1343 2

42 U.S.C. §1983 2

Ind. Code §13-7-22-2.7(c)..... 7

Ind. Code §13-7-31-3 9

Ind. Code §13-7-31-6 9

Ind. Code §13-7-31-8 2

Ind. Code §13-7-31-8(d) 10

Ind. Code §13-7-31-8.2(c)..... 2

Ind. Code §13-7-31-8.2(d) 3

Ind. Code §13-7-31-12 9

Ind. Code §13-7-31-13.1..... 3, 9

Ind. Code §13-7-31-13.3..... 3

TABLE OF AUTHORITIES – *(Continued)*

Statutes: Page

Ind. Code §13-7-31-14 ..... 3, 9

Ind. Code §13-7-31-16.1 ..... 3, 9

Ind. Code §13-7-22-2.7(c)(1) 7

Ind. Code §13-7-22-2.7(c)(2) 7

Ind. Code §13-9.5-5-1 7

OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1 to Petition for Writ of Certiorari) is now reported at 975 F.2d 1267 (7th Cir. 1992). The Opinion of the district court (App. 35 to Petition for Writ of Certiorari) is not yet reported.

STATEMENT OF THE CASE

I. INTRODUCTION

A. Respondents And Their Role In Interstate Commerce.

The respondents/plaintiffs are Pennsylvania corporations that broker shipments of municipal solid waste ("MSW") which originate in New York, New Jersey, and Pennsylvania. They act as middlemen between transfer and recycling stations, where the waste is sorted and/or stored after curbside pickup, and truckers who then transport the MSW in tractor trailers for disposal in Indiana and other states. Respondents do not haul the solid waste or own the trucks, transfer stations, or landfills. Respondents' arrangements with each transfer station, trucker, and landfill are *ad hoc* and consummated by daily telephone calls.

Because landfill space is at a great premium in the east, the cost of dumping MSW in east coast facilities is as high as $125 per ton. Since Indiana landfills charge only $15 per ton, it was cheaper to dispose of MSW in Indiana landfills even though the transportation cost was $35 per ton, prior to the enactment of the statutes successfully challenged by respondents.

Individual truckers may haul MSW to Indiana only once in several years. [*E.g.*, A. 217-304.][1] Each load is transported on an *ad hoc*, one-time basis. Neither the

---

1. Materials in the Appendix bound with the Petition for Writ of Certiorari are cited "App. _____". Materials in the record submitted to the Seventh Circuit are cited "A. _____".

broker nor the trucker knows significantly in advance that any specific vehicle will be used for transporting MSW.

Virtually all MSW transported in interstate commerce from the east coast to Indiana is transported in tractor trailers. [A. 454, 488-492; 376, 404-405; 217.] These are the same vehicles which haul raw and manufactured goods and commodities in interstate commerce. Indiana generated MSW is shipped intrastate for disposal in Indiana landfills in traditional, dedicated garbage trucks. [App. 8.]

Interstate truckers who have hauled goods from Indiana, and elsewhere, as a front haul must return to some point for their next front haul. Rather than run empty, since operating costs do not significantly change whether the truck is empty or fully loaded, respondents arrange for the truckers to back haul MSW, for which the trucks receive a small fee, sufficient to cover their operating costs. Respondents do 80% and 60% of their business respectively in Indiana, given the combination of low disposal fees and Indiana's central location to midwest markets and manufacturing centers. The interstate truckers' main source of income is the front haul. [*See* App. 7-9; 42-44.]

B. Procedural History.

On August 9, 1991, respondents filed a Complaint for Declaratory Judgment, later amended, together with a Motion for Injunctive Relief respecting ten provisions of Indiana legislation which respondents contended violated the Commerce Clause and the Fourteenth Amendment to the United States Constitution, cognizable under 42 U.S.C. § 1983, jurisdiction residing in the Court pursuant to 28 U.S.C. §§ 1331 and 1343.

Only three provisions are at issue by the Petition for a Writ of Certiorari:

> The municipal waste collection vehicle registration/stickering provisions, IC 13-7-31-8; 8.2(c)

and (d); 13-7-31-16.1; 13-7-31-13.3; and 13-7-31-14; and the back haul ban, IC 13-7-31-13.1.

The trial court determined to conduct an evidentiary hearing on the back haul ban and registration/sticker provisions [A. 61, 78], which occurred on November 7, 8, 12, 13, and 14, 1991. On February 5, 1992, the trial court denied respondents relief. [App. 35-68.] On February 6, 1992, the trial court denied respondents' motion for an injunction pending appeal, and respondents' filed a notice of appeal. [A. 9.]

On February 7, 1992, respondents filed with the Seventh Circuit Court of Appeals a motion for injunction pending appeal and emergency motion for expedited appeal and expedited review, seeking to preclude petitioners from enforcing the registration/sticker program and back haul ban. On February 7 and 10, 1992, the Seventh Circuit issued Orders enjoining enforcement of the back haul ban and vehicle registration/sticker program through the course of respondents' appeal, and set an accelerated briefing and argument schedule. [A. 11, 14.]

On September 17, 1992, the Seventh Circuit reversed the judgment of the trial court, holding that the back haul ban and vehicle registration/stickering program, separately and together, violate the dormant Commerce Clause. [App. 1-34.]

The Petition for a Writ of Certiorari, filed on or about November 10, 1992, is limited to attempting to secure this Court's review of the Seventh Circuit's determinations that the back haul ban and vehicle registration/stickering program are unconstitutional, on Commerce Clause grounds.

C. The Seventh Circuit's Opinions And Orders.

In sustaining the back haul ban and vehicle registration/sticker program, the trial court held that elevated scrutiny did not apply. It then determined that irrational

and emotional perceptions held by some constituents of a health risk from crosshauling [App. 53-54], and irrational and emotional fears of damage to commercial reputation held by some shippers or constituents arising from crosshauling [App. 53-54, 57], absent any facts or scientific data, constituted a cognizable *Pike* putative local benefit, rendering the statutes constitutional.

In enjoining enforcement of these statutes pending disposition of respondents' appeal, the Seventh Circuit expressed grave concern over the trial court's analysis:

> "[T]he district court has concluded that an unfounded, indeed irrational, public reaction supports legislation that places a substantial burden on interstate commerce. It may be that politicians (and shippers) must concern themselves with unreasoned public opinion; it is far less clear that the Constitution allows a state to burden interstate commerce on this account."

[A. 11-12.]

This concern carried over to the disposition of this case on the merits. The Seventh Circuit began its analysis of the merits of the back haul ban and vehicle registration/stickering program by noting that under the dormant Commerce Clause, and as it applies to the interstate commerce in out-of-state generated wastes, this Court's Opinions in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ____ , 112 S.Ct. 2019, 2023 (1992), and *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S.Ct. 2009 (1992), striking down Michigan and Alabama laws discriminating against interstate commerce in wastes, reaffirmed a "basic" principle underlying *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978):

> "One state may not 'isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.' *Philadelphia v.*

New Jersey, 437 U.S. at 628; *see Chemical Waste*, 112 S.Ct. at 2012; *Fort Gratiot*, 112 S.Ct. at 2024."

[App. 16.] It then analyzed whether the back haul ban and its attendant registration and stickering provisions erected such a barrier. Although facially neutral, the Seventh Circuit concluded, based upon this Court's precedent, that the effect of the back haul ban was to discriminate against interstate commerce because it reduced very significantly the in flow of out-of-state wastes. This reduction required that the statutes be subjected to elevated scrutiny, not the *Pike* test, thereby mandating that the petitioners establish that the discrimination was demonstrably justified by a valid factor unrelated to economic protectionism, in order to save the statutes. [App. 17-21.]

The efforts to demonstrably justify valid factors unrelated to economic protectionism are the state's proffers of its substantial interests in public health and commercial reputation. The Court was struck by the absence of evidence of health risk or any adverse commercial reputation to any Indiana manufactured products, or anywhere else for that matter, as a result of hauling those goods in a vehicle which had transported solid wastes. Indeed, finding the back haul ban and vehicle registration and stickering programs an obvious effort to saddle those outside the state with the entire burden of slowing the flow of refuse into the state's remaining landfills, the Seventh Circuit declared these statutes unconstitutional. [App. 21-23.]

Respecting the registration and sticker alone, the Court noted that the sticker permanently and universally identified a vehicle as one which is registered in Indiana to carry MSW, telling nothing about whether or when the vehicle has in fact carried MSW into Indiana or some other state. Moreover, since no sticker provided the date of the last garbage haul, if any, the sticker was of no utility. Thus, the Seventh Circuit found that the stickering was not effective in providing information on a truck's past haulage;

rather, it would serve only to divert the flow of waste from Indiana by discouraging shippers through sticker stigma from using vehicles which have been registered. The Seventh Circuit found, as well, that given the occasional hauler of municipal solid waste, the per haul cost of the registration fee alone rendered the fee a discriminatory unapportioned tax, unconstitutional under *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987). Indeed, Indiana conceded that the statute was aimed at eliminating the practice of making *ad hoc* contracts to haul trash. [App. 24-27, 50.]

After finding the surety bond and tipping fee provisions unconstitutional, neither of which are challenged by petitioners' application, the Seventh Circuit noted that even under *Pike v. Bruce Church, Inc.*, 297 U.S. 137 (1970), the back haul ban, registration and stickering programs violated the Commerce Clause [App. 32-34] because the statutes, if enforced, would effectively bar the importation of out-of-state wastes into Indiana, that burden being clearly excessive in relation to the putative local benefits ascribed to the statutes.

II. INDIANA'S CAMPAIGN AGAINST OUT-OF-STATE WASTE

The Opinion of the Seventh Circuit found unconstitutional a second generation of statutes aimed at stopping commerce in out-of state generated wastes, the first generation having been decreed unconstitutional in December 1990. Each set of statutes declared unconstitutional resulted from bicameral, bipartisan efforts of the legislature and administration to stop out-of-state wastes.

In 1990, in order "to take aggressive action to insure that Indiana did not become the dumping-ground of trash from the east coast", the Governor of the State of Indiana, its Commissioner of the Department of Environmental Management ("IDEM"), and others lobbied for and passed HEA 1240, which was heralded as a measure that "will

help stop the importation of out-of-state garbage into Indiana". [A. 188-190, 191-194, 195, 196-197.][2]

Respondents Government Suppliers Consolidating Services, Inc. and Jack Castenova, Inc. challenged three provisions of HEA 1240: a disposal fee provision [Indiana Code § 13-9.5-5-1]; a hauler certification [Indiana Code § 13-7-22-2.7(c)(1)]; and a health officer certification [Indiana Code § 13-7-22.2.7(c)(2)].

On December 27, 1990, the Honorable Daniel J. Tinder of the United States District Court for the Southern District of Indiana found each of these statutes unconstitutional, as violative of the dormant Commerce Clause. *Government Consolidating Serv. v. Bayh*, 753 F.Supp. 7[illegible] (S.D. Ind. 1990). That very day, Governor Bayh responded to the adverse "consequences of the unfettered flow" of out-of-state municipal wastes, vowing that "we will not let down in the fight". [A. 201-202.] On January 25, 1992, in announcing that he would not appeal Judge Tinder's decision, Governor Bayh reiterated his commitment to "stopping Indiana from becoming a dumping ground for east coast garbage." [A. 203-205.]

The 199[illegible] State of the State Address [A. 210-212] noted the "intolerable" situation attributable to the striking down by Judge Tinder of the legislation enacted in 1990 "to stem the tide of out-of-state waste", which the Administration would redress. The mechanisms chosen to redress "the intolerable situation" were the back haul ban and registration/sticker program presented by the Governor's designated spokesperson on environmental matters as an amendment to the Administration's environmental bills.

That the intent and effect of the amendments were to curb the disposal of out-of-state generated municipal waste

---

2. The Governor recited in his State of the State Address that "what must be stopped is the tidal wave of out-of-state trash that threatens to turn Indiana into a dumping ground", which trash was "coming by the truck load". [*Id.*]

in Indiana landfills is readily gleaned from the pronouncements and writings of the Administration officials. One need look no further than the testimony of defendant Kathy Prosser, Commissioner of the Indiana Department of Environmental Management, and her article entitled "Out-Of-State Waste: We Need A National Solution", published shortly before Governor Bayh signed the statutes at issue. [A. 206-207.] Ms. Prosser noted that disposal companies in the northeast were trucking their garbage westward due to the vast difference in tipping fees and that, despite Judge Tinder's Opinion, Indiana continues to "aggressively pursue measures in-state" to deal with the influx of out-of-state generated municipal wastes, such measures including "legislation outlawing back hauling, special licensing and placarding for solid waste vehicles." [A. 379-381.] It is, therefore, not surprising that the Seventh Circuit commented that the course of events surrounding the enactment of the back haul ban and vehicle registration/stickering program suggest that they were motivated by a discriminatory purpose:

> "The appellants characterize the statutes' effects on interstate commerce as incidental; in fact, the 'circumstances of enactment suggest that it was the principal objective' of the statutes to impede importation of trash. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 39 (1980)."

[A. 19].

Judge Tinder's Opinion had delineated with specificity the role that tractor trailers played in transporting out-of-state generated municipal wastes to Indiana for disposal in Indiana landfills. *See, e.g., Government Suppliers, supra*, 753 F.Supp. at 748-750, 752-753.

Learning from Judge Tinder's detailed description, in May of 1991 Indiana passed a series of new statutes designed to keep out-of-state generated MSW from disposal in Indiana landfills. Some provisions, although facially neutral, were crafted to preclude the long haul

transport of municipal solid waste to Indiana landfills by tractor trailer, as the business had been described by Judge Tinder. Indeed, these statutes erected economic barriers to interstate commerce in out-of-state generated wastes.

III. ECONOMIC BARRIER TO INTERSTATE COMMERCE ERECTED BY THE STATUTES

The back haul ban, IC § 13-7-31-13.1, restricts the hauls which a municipal waste vehicle can carry to MSW, construction debris, highway maintenance materials, and hazardous or special wastes. [App. 73.] No vehicle which hauls any of these other categories of wastes is restricted in what it can haul, so long as it is not registered to haul MSW.

The municipal waste vehicle registration/sticker program, IC §§ 13-7-31-3, 6, 8.2, 14 and 16.1, requires that each vehicle transporting MSW must have a registration from IDEM, which lists all vehicles owned, leased, or operated by the transporter, and which must be carried on each vehicle registered at all times. In addition, each registered vehicle must bear two municipal waste stickers *at all times* in a prominent location on each side of the registered vehicle cargo compartment or truck cab. [App. 71-73.] There is a flat $100 fee for each registration regardless of the number of vehicles owned, leased or operated, and a $1.50 fee per vehicle for stickers. [App. 73.] The registration fee is unaffected by the number of hauls or amount of MSW disposed in Indiana. No loads of MSW may be disposed at an Indiana landfill unless the vehicle bears the stickers.[3] Indiana has up to 30 days within which to issue the registration and sticker. [IC § 13-7-

3. Generators, brokers, and transporters involved in the disposal of MSW at Indiana landfills have to submit manifests accompanying each load. [IC §§ 13-7-31-12, 14.] The manifests require the identification of the generator, the description of the wastes, the identification of the transporter, broker, and the identification of the vehicle carrying MSW.

318(d); App. 72.] No mechanism for prompt issuance was contemplated or extant.

The effect of the back haul ban and municipal waste vehicle registration/sticker program is to eliminate the disposal of out-of-state generated MSW in Indiana by making it so costly to back haul MSW that no vehicle operator will do so. This effect is accomplished by the back haul ban, which requires that the vehicles be dedicated to the non-profitable hauling of MSW, and enforced by the registration/sticker program, which assures that all potential customers will know that the vehicle is registered to haul MSW. The necessary effect of the statutes is to force haulers to choose between using their multi-purpose tractor trailers only for hauling MSW, or to eschew back hauling MSW altogether, thereby eliminating the only means of bringing out-of-state MSW to Indiana.[4] The former requires so substantial an increase in trucking fees that even were haulers to dedicate their trailers to MSW, no MSW would be disposed in Indiana. Thus, the effect of the statutes is to isolate Indiana from out-of-state MSW by eliminating cross-hauling of goods and products with MSW, the only means through which out-of-state generated MSW is transported to Indiana, or by increasing costs to such an extent that no trailers can dispose MSW in Indiana, even if haulers dedicate their trailers to MSW.

Since virtually all in-state generated solid wastes disposed of in Indiana landfills were hauled in traditional garbage trucks [App. 8; 53], and none were hauled in tractor trailers, these statutes, effectively barring the utilization of tractor trailers to back haul municipal solid waste to Indiana landfills would drastically reduce the volume of such wastes in interstate commerce, as the Seventh Circuit found. [App. 19, 20, 34.]

---

4. Traditional garbage trucks cannot be used to long haul out-of-state generated MSW. [*E.g.*, A. 431-432.] There are no fleets of dedicated tractors/trailer trucks available for hauling out-of-state generated MSW. [A. 683, 693; 623; 628-630.]

IV. NO EVIDENCE OF ADVERSE HEALTH EFFECTS OR DAMAGE TO COMMERCIAL REPUTATION

The petitioners defended the statutory enactments challenged by raising the *post hoc* justifications of adverse health effects and damage to commercial reputation of Indiana goods arising from the cross-hauling of goods in vehicles which have hauled solid wastes.[5]

Both the Seventh Circuit and the trial court found there was no scientific evidence that cross-hauling even food with MSW raised any health related concerns.[6] [App. 21-22, 53-54.] The record is devoid of any trucker, shipper, or anyone else ever reporting or being made aware of any adverse health effect resulting from the cross-hauling of any products whatsoever with MSW. Even petitioners' own witness so testified. [A. 447, 448.]

In addition, both the Seventh Circuit and the trial court found there was no evidence of diminished commercial reputation resulting from cross-hauling. [App. 22, 54.] No petitioner or witness testified to any instance in which any manufactured good was adversely affected in any way from having been cross-hauled in a trailer which carried MSW.

REASONS FOR DENYING THE PETITION

Five months ago, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of National Resources*, 504 U.S. ____, 112 S.Ct. 2019 (1992), and in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S.Ct. 2009 (1992), this Court reaffirmed the principles set forth in *City*

---

5. Were "elevated scrutiny" applicable, petitioners needed to establish valid factors unrelated to economic protectionism which demonstrably justified discrimination. Were *Pike* applicable, petitioners needed to establish a legitimate local public interest and putative local benefit.

6. Respondents did not challenge Indiana's statute restricting the cross-hauling of food and MSW.

of Philadelphia v. New Jersey, 437 U.S. 617 (1978), and applied elevated scrutiny to strike down both facially neutral and facially discriminatory state enactments because the effect of each was not even-handed; rather, each erected a barrier to interstate commerce in out-of-state generated wastes. One may fairly ask why this Court should again review the constitutionality on Commerce Clause grounds of another state's enactments which the trial court and Seventh Circuit found had the effect of barring the importation of MSW into Indiana [App. 34, 57, 55, 51][7] and which the trial court, in part, and the Seventh Circuit found were enacted with the principle objective of impeding the importation of out-of-state generated wastes. [App. 19, 58.]

This question is even more compelling because petitioners do not even cite to *Chemical Waste Management* or *City of Philadelphia* and reference *Fort Gratiot* only in a footnote, and for an inapposite proposition. Petitioners do not even suggest that the Seventh Circuit's Opinion misunderstands or misapplies *Fort Gratiot* or *Chemical Waste Management*, or *City of Philadelphia*.

Rather, petitioners suggest that the Seventh Circuit erred by subjecting Indiana's statutes to elevated scrutiny. They contend that because the enactments are facially neutral, any "disparate impact" on interstate commerce does not violate the dormant Commerce Clause. In so suggesting, petitioners express two fundamental misunderstandings of this Court's precedent and the Seventh Circuit's Opinion.

This Court has repeatedly struck down any state statute which has the purpose or effect of blocking interstate commerce at a state's borders, regardless of whether

---

7. The Seventh Circuit found that the statutes had the effect of barring the importation of MSW. The district court, while making no such specific finding, in discussing each statute *seriatim*, did note that the result of each was to restrict the amount of MSW coming into Indiana.

the enactment is facially neutral or facially discriminatory. The question is whether the statute even-handedly impacts upon interstate and intrastate commerce and not the artful wording used by the legislature. Second, this Court has upheld state statutes regulating the manner in which interstate entities conduct their business affairs only if the amount of interstate commerce is not diminished *and* adherence to those statutes imposes no additional burdens solely upon out-of-state persons involved in that commerce. In striking down Indiana's statutes, the Seventh Circuit was merely following this Court's precedent, crafting no new theory of "disparate impact".

Finally, since the burden on commerce imposed by the Indiana statutes as found by both the trial court and the Seventh Circuit is to "effectively bar the importation of out-of-state waste into Indiana" [App. 34, 58], and since the Seventh Circuit and even the trial court concluded that the asserted health and commercial reputation benefits advanced to support the statutes were neither supported by meaningful evidence nor safeguarded by the statutes [App. 21-23, 24, 33-34, 53-54], the Seventh Circuit's declaration of unconstitutionality is unassailable, regardless of whether elevated scrutiny or the *Pike* test applies.

Given the virtual cessation of commerce caused by the challenged statutes and the absence of any evidence suggesting a valid local benefit, petitioners' question presented is not before this Court, even were their analysis of the Commerce Clause correct. Since their analysis is fundamentally wrong, no basis for this Court's assumption of jurisdiction exits.

I. DISCRIMINATORY EFFECT IS A WELL-SETTLED BASIS FOR APPLYING ELEVATED SCRUTINY TO STATE STATUTES

In ruling against petitioners, the unanimous panel Opinion of the Seventh Circuit Court of Appeals took the facts as found by the district court [App. 7], and concluded

that the statutes crafting the back haul ban and registration/stickering program violate the Commerce Clause because they (1) "would effectively bar the importation of out-of-state waste into Indiana"; (2) which burden "is clearly excessive in relation to the putative local benefits of the statutes"; and (3) that the blithe assertions that Indiana manufactured goods may suffer a tarnished reputation from being contaminated during shipment in trailers which may have hauled MSW to Indiana only, and that Indiana citizens may suffer adverse health effects from receiving goods transported in trailers which may have hauled municipal solid waste to Indiana, were unsupported and unsupportable. [App. 34, 21-22.]

The Seventh Circuit also found that means far less disruptive to interstate commerce than the back haul ban and vehicle registration/stickering program were available, but not enacted, which is not surprising because, as the Seventh Circuit opined, "the circumstances of enactment suggest that it was the principal objective of the statutes to impede the importation of trash." [App. 19.]

Regardless of the standard used to measure the validity of these statutes against the strictures of the Commerce Clause, it is obvious that the cessation of interstate commerce weighed against proffered speculative and unsubstantiated local benefits, each of which could be met with less intrusive means, requires that the statutes be deemed unconstitutional. The Seventh Circuit so found under both the "elevated scrutiny" standard enunciated in, *inter alia*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and the lesser level of scrutiny enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), because the statutes violated the cardinal tenet of *City of Philadelphia*:

> "One state may not 'isolate' itself from a problem common to many by erecting a barrier against the movement of interstate trade.' *Philadelphia v. New Jersey*, 437 U.S. at 268; *see Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112

S.Ct. 2009, 2012 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ____, 112 S.Ct. 2019, 2024 (1992)."[App. 16.]

Petitioners contend that their quarrel is only with the Seventh Circuit's utilization of the elevated scrutiny standard, and not the application of that standard. They aver that since the statutes are facially neutral, elevated scrutiny does not apply, thereby authorizing a disproportionate impact on out-of-state persons involved in interstate commerce. This contention ignores the virtual cessation of all commerce in out-of-state generated municipal wastes by instate and out-of-state persons. It is also contrary to this Court's pronouncements.

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court deemed unconstitutional a statute whose effect was to restrict the disposal within New Jersey of out-of-state generated wastes. In the course of ruling, this Court applied elevated scrutiny in the absence of ascribing a legislative purpose because "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia*, *supra*, 437 U.S. at 626. Finding that the statute constituted an illegitimate means of isolating the state from the national economy, this Court opined that the linchpin of the statute's unconstitutionality was its discriminatory effect by erecting the barrier against the movement of interstate trade:

> "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."

Id. at 628.

It was the requisite "alertness to the evils of economic isolation and protectionism" which compelled this Court to conclude that either discriminatory effect or discriminatory purpose is sufficient to trigger the virtually *per se* rule of

invalidity, occurring on application of the elevated scrutiny standard. The law has remained the same.

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S.Ct. 2009 (1992), striking down on Commerce Clause grounds an Alabama statute imposing an additional disposal fee on out-of-state generated hazardous waste, this Court applied the elevated scrutiny test, not because the statute's additional fee facially discriminated against out-of-state generated hazardous wastes, but rather, because of discriminatory effect:

> "Invalidity under the Commerce Clause necessarily follows, for 'whatever [Alabama's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently.' (Citations omitted.) The burden is on the state to show that 'the *discrimination* is demonstrably justified by a factor unrelated to economic protectionism.' "

Chemical Waste Management, supra, 504 U.S. ____, 112 S.Ct. at 2015 (emphasis in original).

Chemical Waste Management discussed the concept of economic protectionism, as set forth in *City of Philadelphia, supra*. This Court noted that the Alabama Supreme Court had found no economic protectionism, based upon its conclusions that the legislature had been motivated by public health and environmental concerns. In response, this Court noted:

> "This narrow focus on the intended consequence of the additional fee does not conform to our precedents, for '[a] finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, *see Hunt v. Washington Apple Advertising*

> *Comm'n*, 432 U.S. 333, 352-353 (1977), or discriminatory effect, *see Philadelphia v. New Jersey, supra*.' (citation omitted). The 'virtually *per se* rule of invalidity,' *Philadelphia v. New Jersey, supra*, 437 U.S. at 624, applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade. *Maine v. Taylor*, 437 U.S. 131 (1986)'."

Chemical Waste Management, supra, 504 U.S. ____, 112 S.Ct. at 2015, n.6.

The same day that *Chemical Waste Management* was decided, this Court decided *Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. ____, 112 S.Ct. 2019 (1992). *Fort Gratiot* applied elevated scrutiny to strike down on Commerce Clause grounds a Michigan statute which authorized each county to bar the disposal of all out-of-county wastes, whether generated within or without the state, due to economic protectionism evidencing discriminatory effect:

> "The Waste Import Restrictions enacted by Michigan authorized each of its 83 counties to isolate itself from the national economy. . . . the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas. In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reason would appear to control the disposition of this case."

Fort Gratiot, supra, 504 U.S. ____, 112 S.Ct. at 2024.

The petitioners had argued that, as opposed to the New Jersey statute reviewed in *City of Philadelphia*, the

Michigan statute did not discriminate against interstate commerce because it treated wastes from other Michigan counties no differently than wastes from other states. This Court rebuked that contention, based upon discriminatory effect:

> "[O]ur prior cases teach that a state (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the moving of articles of commerce through subdivisions of the state, rather than through the state itself."

Fort Gratiot, *supra*, 504 U.S. ____, 112 S.Ct. at 2024. Indeed, finding that the statute constituted economic isolation and protectionism, this Court concluded that the waste import restrictions "unambiguously discriminate against interstate commerce" [*id.*, at 2027].

Thus, in waste disposal cases, this Court has applied elevated scrutiny to statutes whether facially neutral or facially discriminatory because the inquiry is whether the statutes treat interstate and intrastate commerce even-handedly, and not whether the language of the enactments disguises protectionist means or ends.

Therefore, petitioners' contentions that the Seventh Circuit misinterpreted this Court's precedent in striking down the back haul ban and vehicle registration/stickering program are simply unsupportable.

II. LIMITING ELEVATED SCRUTINY TO FACIAL DISCRIMINATION WOULD REVERSE NUMEROUS DECISIONS OF THIS COURT AND EMASCULATE THE DORMANT COMMERCE CLAUSE

This Court's analysis of Commerce Clause cases regarding waste disposal is consistent with its treatment of all other Commerce Clause cases challenging state enactments — if statutes are intended to and do result in more than an incidental diminution of interstate commerce in specific articles, they are subject to elevated scrutiny and

are struck down. For example, based upon the determination that discriminatory purposes or discriminatory effects erect a barrier to commerce, this Court has applied elevated scrutiny to state enactments (1) directly discriminating against out-of-state generated commodities themselves [*e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-271 (1984); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)]; (2) indirectly discriminating against those commodities by requiring adherence to facially neutral state packaging regulations [*e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-52 (1977)]; and (3) discriminating against commodities by taxing the person or means of transaction of commerce through facially neutral statutes [*e.g.*, *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Healy v. Beer Institute, Inc.*, 109 S.Ct. 2491 (1989); *Best & Company, Inc. v. Maxwell*, 311 U.S. 454, 455 (1940)].[8]

Petitioners suggest that the Seventh Circuit has misinterpreted this Court's precedent by applying elevated scrutiny to strike down a facially neutral statute based upon its "disparate impact", a term the Seventh Circuit does not even use in its Opinion. In so contending, petitioners do note that this Court's Opinion in *Hunt v. Washington State Apple* is contrary to their position. [Petition for Writ, 14, 15.] So is *Fort Gratiot*. At bottom, petitioners' contention falls because they fail to recognize that this Court has repeatedly applied elevated scrutiny to strike down statutes challenged on Commerce Clause grounds if the

---

8. Indeed, this Court has even struck down facially neutral state statutes which were intended to and did regulate only vehicles used to transport articles in commerce, and not the articles themselves, utilizing both special scrutiny and *Pike* standards in majority, plurality, and concurring opinions. *E.g.*, *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (truck length); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) (truck length); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526 (1959) (truck flaps); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (train length).

legislative means or legislative ends reflect a state's isolation from a common problem by erecting a barrier against the movement of interstate trade. Although facial discrimination may tend to suggest the proscribed discriminatory purpose or discriminatory effect, facially neutral statutes may suffer from the same defects, as well.

Indeed, petitioners' disparate impact theory premised upon a facially neutral statute constitutes a fundamental misreading of even *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the case on which its analysis hinges. *Pike* said nothing about facially neutral statutes; rather, *Pike* noted that the elevated scrutiny test does not apply:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."

Id., at 142. Under such circumstances, *Pike* noted that the statute:

> "Will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Id., at 143.

Pike's concern has always been the paramount concern of this Court. In *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951), this Court struck down a facially neutral city ordinance challenged on Commerce Clause grounds which was not even-handed in effect, noting that to do otherwise would emasculate the Commerce Clause "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods". In *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), this Court struck down a facially neutral statute, noting that the Commerce Clause "forbids discrimination; whether forthright or ingenious". *Accord*, *Nippert v. City of Richmond*, 327 U.S. 416 (1948).

Thus, elevated scrutiny has been applied to strike down facially neutral statutes challenged on Commerce Clause grounds, since the question is not artful drafting but rather discriminatory effect. To hold otherwise, as petitioners suggest, overturns a continuum of over one hundred years of Commerce Clause decisions of this Court, beginning with *Brimmer v. Rebman*, 138 U.S. 78 (1891).

III. THE PETITIONERS' CLAIM OF ERROR IS UNDERCUT BY THE AUTHORITIES ON WHICH THEY PURPORT TO RELY

Petitioners rely on *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) to support their contention. In fact, these cases do no such thing.

In *Exxon Corp.*, this Court upheld a facially neutral statute which had the effect of barring refiners from owning retail gas stations in Maryland. No oil company had a refinery in Maryland. In finding no Commerce Clause violation, this Court concluded that the statute did not discriminate against interstate commerce because Maryland's entire gasoline supply flowed in interstate commerce in the absence of any local producer or refinery. Indeed, relying on *Hunt* and *Dean Milk*, this Court noted that were the effect of the regulation to diminish gasoline flowing in interstate commerce, a different result would ensue. *Exxon*, *supra*, 437 U.S. at 126 n.16.

Thus, this Court recognized a distinction between discriminating against articles in commerce themselves, as opposed to regulating the structure of entities conducting the commerce. This, of course, is consistent with this Court's analyses set forth above.

Petitioners' reliance on *CTS* evidences yet again their misunderstanding of this Court's Commerce Clause analysis. In *CTS*, this Court affirmed a state enactment which, for a subset of some entities formally incorporated within

Indiana, created procedures applicable to all persons seeking to obtain controlling shares of stock in the state's corporation. The article in commerce was the shares of those certain Indiana corporations. The shares themselves were unaffected by the Act, and no barriers to entry into the state were created by the legislation. The Act had the same effects on tender offers, whether or not the offerer was a resident of Indiana, and, therefore, visited its effects equally upon both out-of-state and local persons. This Court found no Commerce Clause violation since the burden of the state's regulation fell not on the article of commerce itself, but rather upon those most likely to attempt a hostile takeover who this Court assumed resided out-of-state. *CTS*, *supra*, 481 U.S. at 88.

By contrast, the Seventh Circuit found that Indiana statutes imposed a substantial burden upon the MSW in commerce itself. In addition, the Court also opined that the statutes imposed far greater burdens on persons involved in the disposal of out-of-state generated wastes in Indiana than those involved in the disposal of in-state generated wastes.

Petitioners' "disparate impact theory of discrimination", which they suggest the Seventh Circuit adopted, is in fact a misreading of opinions of this Court. Because the back haul ban and registration/stickering program in fact eliminated all interstate commerce in out-of-state generated solid wastes, and imposed greater burdens on those participating in such commerce, petitioners' disparate impact theory which they attribute to the Seventh Circuit is not only inapposite but also incorrect.

IV. THERE IS NO CONFLICT IN THE CIRCUITS; MOREOVER THIS COURT HAS GIVEN THE GUIDANCE WHICH PETITIONERS SEEK

Petitioners next suggest that this Court ought review the Seventh Circuit's determination because of a conflict in the Circuits over the utilization of the term "discriminatory

effect", relying principally upon the Third Circuit's analysis in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). That case did, five years ago, read this Court's cases to conclude that "discriminatory effect" is limited to purposeful discrimination. *Id.* at 400. Finding none, the Third Circuit upheld a statute challenged on Commerce Clause grounds upon application of the *Pike* test. The issue which petitioners recite must be clarified by this Court — whether "discriminatory effect" cases are governed by strict scrutiny absent purposeful discrimination — appears to have been previously answered in the affirmative by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and further refined and discussed by this Court *after Oberly* and each of the cases relied upon to support petitioners' contention of confusion were decided. *Since Fort Gratiot* itself applied heightened scrutiny to a facially neutral statute which permitted each of Michigan's 83 counties to bar the disposal of all out-of-county generated wastes, thereby allowing each county to isolate itself from the national economy, because it "unambiguously discriminated against interstate commerce", the need for guidance to the Circuits seems nil. This conclusion is buttressed by this Court's Opinion in *Chemical Waste Management*, which links elevated scrutiny to a finding that the statute constitutes economic protectionism or isolation, which:

> "May be made on the basis of either discriminatory purpose, *see Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-353 (1977) or discriminatory effect, *see Philadelphia v. New Jersey, supra*," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). The "virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra*, 437 U.S. at 624 applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns

by discriminating arbitrarily against interstate trade. *Maine v. Taylor*, 477 U.S. 131, 148, n.19 (1986)."

Chemical Waste Management, *supra*, 112 S.Ct. at 2015, n.6.

Finally, both the Seventh Circuit and the trial court acknowledge that the purpose of the enactments was to impede the importation of MSW. [App. 19, 58.] Thus, the question which petitioners contend needs clarification from this Court would not be reached were the Petition granted, even were its Commerce Clause analysis correct.

V. PETITIONERS' CLAIMED "ERROR" IS IRRELEVANT TO THE SEVENTH CIRCUIT'S JUDGMENT

At bottom, petitioners' contentions fail because the Seventh Circuit used elevated scrutiny to analyze the back haul ban and vehicle registration/stickering program not because of any disproportionate impact upon out-of-state persons and entities involved in interstate commerce in MSW, but rather, because of the blockage of interstate commerce. [App. at 19-20, 34.]

The Seventh Circuit agreed that the Commerce Clause does not protect a particular structure or method of operation of business. Rather, the Court deemed strict scrutiny applicable because, with raised transport costs, Indiana has in effect erected an economic barrier against the importation of municipal waste. [*Id.*]

VI. THE SEVENTH CIRCUIT'S ALTERNATIVE HOLDING UNDER THE *PIKE* TEST PROVIDES A CORRECT AND INDEPENDENT BASIS FOR ITS DECISION

In striking down the challenged Indiana statutes, the Seventh Circuit determined that not only are the statutes unconstitutional under the elevated scrutiny standard, but also, "[s]o weak is the rationale offered by Indiana, that even when the statutes are examined under the *Pike* test,

the same result is reached". [App. 32.] Petitioners unjustifiably criticize the Seventh Circuit's *Pike* analysis as an example of improper judicial second-guessing of legislative policy judgments. [Pet. at 12, 21, and 26.]

The Seventh Circuit did exactly what this Court has consistently required since *Pike*: determine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits". *Pike*, *supra*, 397 U.S. at 142. Respecting burden, the Seventh Circuit found, for reasons explained above, that "the statutes at issue here would effectively bar the importation of out-of-state waste into Indiana", and that this burden on interstate commerce was "clearly excessive in relation to the putative local benefits of the statutes". [App. 34].

Respecting local benefits, Indiana had asserted *post hoc* justifications: preventing adverse health effects that arise from cross-hauling and protecting the commercial reputation of Indiana products. Although an evidentiary hearing was held specifically for the purpose of presenting evidence regarding "putative local benefits", petitioners presented none. Under these circumstances, the Seventh Circuit, not surprisingly, found that petitioners had failed to demonstrate "a realistic possibility that Indiana goods will actually be contaminated and that contamination will adversely affect their reputation". [App. 22.]

Petitioners cannot challenge this dispositive finding. They presented no evidence of an adverse effect of cross-hauling on anyone's pocketbook. They failed to identify a single instance of contamination or a single person who was damaged by cross-hauling.

In assessing the putative local benefit to health, the Seventh Circuit correctly discerned that Indiana was not acting "to protect its own citizens' health". [App. 22.] If anyone's health were to be affected by cross-hauling of solid waste with other goods, it would be the recipients of Indiana goods in the eastern United States. *Id.* In assessing

putative *local* benefits, the Seventh Circuit properly concluded that Indiana's primary interest arising from contaminated goods affected the health of users was in tarnishing the commercial reputation of Indiana goods. This analysis is fully consistent with the precedent of this Court. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

Petitioners also criticize the Court of Appeals for observing that the challenged statutes fall short of achieving the claimed benefits because of a loophole big enough to drive a fleet of garbage trucks through. [Pet. at 23.] Specifically, the statutes fail to prevent cross-hauling of Indiana goods in trucks that have hauled solid waste for disposal in Illinois, Ohio, Kentucky or any state other than Indiana. As a result, Indiana's statutes will at best, "further their stated purpose only marginally". [App. 33.] This Court has specifically approved judicial assessment of whether putative local benefits are furthered only marginally in making the determination required by *Pike*. *E.g.*, *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion).

The statutes in question fail not only the *Pike* and elevated scrutiny tests, but also they violate another well-settled prong of Commerce Clause analysis due to their extra-territorial effect. As this Court has repeatedly held, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. Thus, no state can adopt legislation that has the practical effect of establishing prices or controlling commerce occurring wholly outside the boundaries of the state, regardless of whether the statutes' extra-territorial reach was intended by the legislature. *E.g.*, *Healy v. Beer Institute, Inc.*, 109 S.Ct. 2491 (1989); *Brown-Forman Distillers v. N.Y. State*, 476 U.S. 573 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion).

Here, the back haul ban and registration/sticker program extend the reach of Indiana law into the manner of conduct of business in every other state. For this reason alone, these statutes are violative of the Commerce Clause. Although raised before the Seventh Circuit, resolution of this issue was unnecessary to its decision. If certiorari were granted, this ground alone suggests that petitioners' other issues need not be addressed.

VII. THE $100 REGISTRATION FEE WAS PROPERLY STRUCK DOWN PURSUANT TO THIS COURT'S ANALYSIS IN *SCHEINER*

Petitioners' last argument for Supreme Court review is that the Seventh Circuit erred by applying "flat tax" analysis to strike down a flat $100 registration fee for vehicles or fleets engaged in transporting solid waste in Indiana. [Pet. at 25-26.] Petitioners' argument on this issue is cursory and meritless.

Petitioners' argument overlooks the critical finding of the trial court that "the $100 registration fee may be prohibitive" [App. 58] for interstate truckers who haul MSW to Indiana only occasionally while posing no significant burden on intrastate haulers. Whatever Commerce Clause analysis is employed, whether it be derived directly from the flat tax cases such as *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266 (1987), or non-tax cases like *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), when the effect of a state statute on interstate commerce is so pronounced as to be prohibitive while at the same time inconsequential to intrastate commerce, the Commerce Clause is violated.

Contrary to petitioners' implication, this Court has never limited its "flat tax" analysis to "taxes" that have been denominated as such.

In any event, petitioners' argument provides no substantial basis for Supreme Court review since Indiana's

entire registration and licensing scheme is constitutionally infirm. As the Seventh Circuit explained:

> "Indiana's registration and stickering provisions are part and parcel of its backhaul ban. Their primary purpose, as Indiana concedes, is to facilitate the enforcement of the backhaul ban. To the extent they are linked to the backhaul ban, they fall with it."

[App. 23.] Since the only purpose of the $100 registration fee is to fund the registration program, it matters not whether the Seventh Circuit's flat tax analysis was correct since the registration program and its supporting fee cannot stand for a wholly independent and adequate reason.

CONCLUSION

The unanimous panel decision of the Seventh Circuit Court of Appeals striking down Indiana's back haul ban and vehicle registration/stickering program under both the strict scrutiny and *Pike* tests is unassailable since it is in strict conformance with this Court's Opinions. Petitioners' contrary contentions are based upon a profound and fundamental misreading and disregard of this Court's Opinions, wrongly equating facial neutrality with evenhandedness, and assuming that the statutory blockage of all interstate commerce withstands analysis under either elevated scrutiny or *Pike* standards. Given this Court's Opinions this year in *Fort Gratiot*, *supra*, and *Chemical Waste Management*, *supra*, reaffirming resoundingly the tenets of *City of Philadelphia*, and the Seventh Circuit's reliance upon these cases, there is no tenable basis to contend that this Court's review is needed or warranted.

Therefore, this Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WHITE & RAUB
BY: RONALD J. WAICUKAUSKI
One N. Capitol Ave., 10th Floor
Indianapolis, IN 46204
(317) 236-8011

ABRAMSON, FREEDMAN & THALL
BY: BRUCE L. THALL
2128 Locust Street
Philadelphia, Pa. 19103
(215) 545-2400

Dated: December 9, 1992